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Client Update

THE YEAR 2000 READINESS AND RESPONSIBILITY ACT: Congress Seeks to Limit the Year 2000 "Litigation Explosion"

March 1, 1999

This week, members of Congress introduced bipartisan legislation intended to minimize the risk that litigation related to the Year 2000 computer date problem will divert limited resources from Year 2000 remediation efforts to legal expenses, thereby increasing the risk of Year 2000 business disruptions. The Year 2000 Readiness and Responsibility Act (H.R. 775) (RRA) would apply to all Year 2000 civil actions filed in state or federal court, except for personal injury claims. Members of McKenna & Cuneo's Year 2000 Practice Group played an active role in drafting the RRA, through the Information Technology Association of America's (ITAA) Year 2000 Legal Advisory Group.

The key features of the RRA are:

- A mandatory 90-day cooling-off period prior to filing Year 2000 litigation;
- Encouragement of alternative dispute resolution for Year 2000 disputes;
- Heightened pleading and proof requirements for certain types of Year 2000 claims;
- A duty to mitigate damages and a "reasonable efforts" defense in certain Year 2000 actions;
- Elimination of joint and several liability in Year 2000 lawsuits;
- Limitations on damages and attorneys' fees recoverable in Year 2000 actions; and
- New requirements for Year 2000 class actions.

The RRA contains the principal features of its Senate counterpart, the Year 2000 Fairness and Responsibility Act (S. 461), although the RRA also contains a number of provisions not found in the Senate bill. *Businesses not only need to be aware of the status of the RRA, but should act today to maximize the protections of the RRA, in anticipation of its enactment.*

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The Prefiling Notice Period

The RRA would mandate a 90-day cooling-off period during which many Year 2000 disputes will settle without resort to litigation. Prior to filing any Year 2000 action that seeks a remedy other than an injunction, the RRA would require that the plaintiff provide each defendant with a written notice identifying with particularity (a) the symptoms of the alleged Year 2000 defect; (b) the plaintiff's alleged injury; and (c) the relief sought. The defendant would need to respond within 30 days by describing the actions it will take or has already taken to address the problem described in the notice. Failure to respond would allow the plaintiff to commence litigation after the 30-day period.

If a plaintiff filed a Year 2000 action without first providing the required notice, the defendant could obtain a 90-day stay of all proceedings, including discovery. The RRA would protect plaintiffs by specifically allowing them to recover sanctions under Rule 11 of the Federal Rules of Civil Procedure if a defendant filed a frivolous stay motion for the purpose of causing unnecessary delay.

Encouragement of Alternative Dispute Resolution

The RRA would encourage, but not require, parties to explore alternative dispute resolution. To give plaintiffs an incentive to consider alternatives to litigation, the RRA would provide that, if the parties' dispute were resolved through any form of alternative dispute resolution, the defendant "shall pay all monies due within 30 days," unless the parties agreed to another time for payment.

Heightened Pleading and Proof Requirements

The RRA would require detailed pleading of certain elements of Year 2000 actions. For example, the complaint in a Year 2000 action that sought the award of money damages would need to state *with particularity* the nature and amount of each element of damages, and the factual basis for the damage calculation. The RRA would authorize courts to dismiss Year 2000 actions, without prejudice, if any of the particularized pleading requirements were not satisfied. Discovery and other proceedings would be stayed while such dismissal motions were pending. During the stay period, the defendant would be obligated to preserve all relevant documents and other materials within its custody or control. In addition, plaintiffs would be required to prove certain elements of Year 2000 actions, such as the defendant's state of mind, by "clear and convincing evidence," rather than by "a preponderance of the evidence," which is the lesser standard of proof currently applicable to civil cases.

The Duty to Mitigate Damages and the "Reasonable Efforts" Defense

The RRA would impose on plaintiffs in Year 2000 actions a duty to avoid injuries that they could have avoided "in light of any disclosure or other information of which the plaintiff was, or reasonably could have been, aware." Damages awarded in Year 2000 actions would exclude any sums that the plaintiff reasonably could have avoided in light of any such disclosure or information.

The RRA also would allow defendants in Year 2000 breach of contract actions to limit their liability by introducing evidence of the reasonableness of their performance, or attempt to perform, under the contract. Although the RRA does not explicitly state that proof of reasonable performance could defeat a breach of contract claim, this section of the bill would be

meaningless unless the evidence of the defendant's reasonableness could possibly lead to a defense victory. In any event, the allowance of "best efforts" evidence in a contract case would represent a major change in the law governing commercial contracts. Outside of the government contracts context, "best efforts" defenses have generally been unavailable to defendants in contract cases. In addition, the RRA would expressly establish a "reasonable efforts" defense in those Year 2000 actions not involving contract claims.

To ensure enforcement of parties' expectations at the time of contracting, the RRA would require that contracts be interpreted under the law in effect at the time the parties entered into their contract. Parties would therefore trade the benefit of potentially favorable future court decisions for certainty. The RRA also provides that, in Year 2000 breach of contract actions, the law of impossibility and commercial impracticability would be determined based on the law in effect on January 1, 1999, rather than at the time of contracting. The sponsors of the RRA are concerned that courts adjudicating Year 2000 cases may modify certain principles of contract law to punish business litigants deemed responsible for Year 2000 problems. The RRA would further require that, in Year 2000 actions, courts enforce all terms of parties' contracts, including, without limitation, limitations or exclusions of liability or disclaimers of warranty, notwithstanding any other provision of federal or state law.

Elimination of Joint and Several Liability

The RRA would eliminate joint and several liability in Year 2000 actions. Under the RRA, judges and juries would determine each party's percentage liability for the plaintiff's loss. Liability would be premised solely on that portion of the judgment corresponding to that person's percentage of responsibility.

Limitations on Damages and Attorneys' Fees

The RRA would limit punitive damage awards in Year 2000 actions to those cases where the plaintiff can prove, by clear and convincing evidence, that the defendant *specifically intended* to cause injury to the plaintiff. This would impose an almost impossible burden on plaintiffs, because in few Year 2000 cases could the plaintiff establish intent to cause harm. Furthermore, the RRA would cap punitive damages in Year 2000 cases at the greater of triple actual damages or $250,000. Small business defendants would be subject to a punitive damages cap based on the lesser of these two amounts. Under the RRA, all punitive damage awards would be paid into a newly created "Year 2000 Recovery Fund," which would assist small businesses, nonprofits, and governmental entities affected by Year 2000 failures.

The RRA would bar recovery of damages in Year 2000 tort claims unless (a) the recovery of such losses was provided in a contract to which the plaintiff is a party; (b) the losses were incidental to a personal injury arising from a Year 2000 failure; or (c) the losses were incidental to damage to tangible property arising from a Year 2000 failure, other than any property that is the subject of a contract between the parties. Furthermore, losses would be recoverable only if authorized under the law in effect on January 1, 1999.

The RRA also would limit Year 2000 liability of corporate officers and directors to the greater of $100,000 or their cash compensation from the corporation over the 12-month period immediately preceding their alleged wrongful act or omission. Any further limits on corporate officer and director liability in existence on January 1, 1999 — including those contained in the corporation's bylaws — would apply as well, even if they were removed or raised after that date.

The House version of the RRA, but not its Senate counterpart, would regulate attorneys' fees recoverable in Year 2000 actions and establish a loan program to help small businesses pay for their Year 2000 remediation expenses. While the RRA would require plaintiffs' attorneys working on a contingency to make detailed disclosures to their clients regarding their fees, the Senate version would mandate that *all* attorneys working on Year 2000 litigation – presumably including defense counsel and government attorneys – make the disclosures. The House bill also would require courts in Year 2000 class actions to determine an appropriate hourly rate for the plaintiffs' counsel at the outset of the litigation, not to exceed $1,000 per hour or 40% of the recovery.

Year 2000 Class Actions

The RRA would also materially limit Year 2000 class actions. A Year 2000 class action would not only need to satisfy all class action requirements, but could only be filed if the alleged defect in the product or service underlying the case was material as to a majority of class members. In any Year 2000 class action involving an allegedly defective product or service, the court would be required to determine, as soon as practicable, whether the RRA's requirements had been satisfied. Furthermore, Year 2000 class action members would need to be provided with mailed notice of the action, containing specified information about the case, including the fee arrangement of class counsel.

In addition, the RRA would expand diversity jurisdiction to allow litigation of Year 2000 class actions in federal court if minimal diversity existed, regardless of the amount in controversy. The federal courts, however, would be allowed to decline jurisdiction in those Year 2000 class actions where (a) the "substantial majority" of the members of the proposed class were citizens of the same state as the primary defendants, and where state law issues predominated; (b) all matters in controversy did not exceed $1,000,000, and where there were fewer than 100 class members; or (c) where the primary defendants were governmental entities against whom the court may be foreclosed from ordering relief. The RRA also would add to the United States Code, a new section on removal, allowing any single defendant or plaintiff class member to remove a Year 2000 class action to federal court. The new removal provision would not apply however, to claims brought under the Securities Act of 1933 or certain state securities law actions.

Conclusion

The RRA has the potential to affect every business in the United States. Few private or public entities will be immune from the Year 2000 problem or the ensuing litigation, whether as a plaintiff or as a defendant. McKenna & Cuneo's Year 2000 Practice Group is closely monitoring the progress of the RRA and its Senate counterpart through Congress. If you would like further information regarding, or copies of, either bill; would like to participate in Congress' consideration of the bills; or have questions regarding any Year 2000 legal issue, please call Lino S. Lipinsky at 202-496-7243, or Matt Schlesinger at 202-496-7651. You can also contact them, and obtain other McKenna & Cuneo publications, through the firm's website at *www.mckennacuneo.com.*